

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400-N  
Washington, D.C. 20001-8002



Date Issued: April 27, 1999

Case No.: 1997-INA-0018

***In the Matter of:***

FIREHOUSE BEACH CAFE,  
*Employer,*

***On Behalf of***

JESUS A. MORALES-RAMIREZ,  
*Alien.*

Certifying Officer: Rebecca Marsh Day, Region IX

Appearance: Rick Loratt

Before: Huddleston, Jarvis and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

This case arises from an application for labor certification filed by Firehouse Beach Cafe for the position of Cook seeking labor certification for Jesus A. Morales-Ramirez, Alien (AF 17). The duties of the job were describe as follows:

Cook preparing a wide range of menu items. Use and knowledge of standard restaurant equipment and utensils. Must be able to handle inventory control for his shift. Able to obtain a Dept. Of Health County of San Diego required Foodhandler's card.

Employer required that applicants have twelve years of education and two years of experience in the job offered or two years of experience as a cook.

The Certifying Officer (CO) issued a Notice of Findings (NOF) proposing to deny certification on April 3, 1996 (AF 13-15). The CO stated that six resumes were sent to Employer on April 20 and two more were sent on April 25, 1995; that it does not appear that Employer attempted to contact seven of the applicants at all or as soon as possible; that recruitment is considered tardy and incomplete; that it appears that Employer failed to recruit U.S. applicants in good faith; that the rejection of U.S. workers is considered not to be based on valid job-related reasons and the job opportunity is not considered to be clearly open to U.S. workers. Employer was instructed to provide details of its attempts to interview the U.S. applicants.

Employer submitted rebuttal on April 22, 1996 (AF 8-12). Rick Loratt stated that EDD sent the first group of resumes to him on April 25, 1995 and that he called each person, with the exception of Daniel Gabshaw and Robert Erhardt whose phones had been disconnected, on the day of receipt, April 27, 1995. Mr. Loratt stated that he also mailed first class letters to the applicants on April 27, 1995 inviting them to an interview on May 4, 1995, at 8:30 am. Mr. Loratt stated further that Lawrence Sprissler was the only applicant to attend the interview, but that he turned down the job because he wanted more money. Mr Loratt assumed that the other applicants received their letter because no letters were returned to him as undeliverable. Mr. Loratt stated that he was not provided an address or telephone number for Bernard Martinez and Michael Ostrander, but that he did have an address for Bernardino Martinez, who he called and

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

who came by his restaurant with a copy of his resume, but failed to return for an interview. Mr. Loratt stated further that he tried to contact all applicants within five days of receipt of their resumes and that he didn't reject any qualified U.S. applicants. Mr. Loratt stated that Mr. Sprissler wanted to be a kitchen manager at an hourly wage rate of \$11.43 rather than a cook at \$8.00 per hour; that Lance Rasmussen, Daniel Bagshaw, Jose Hurtado and Lindel Sue King did not attend the interview.

The CO issued a Final Determination denying certification on June 21, 1996 (AF 6-7). The CO stated that due to Employer's failure to submit the requested documentation, the findings in the NOF are deemed admitted and are the final determination of the Secretary of Labor.

Employer filed a request for reconsideration and review by the Board of Alien Labor Certification Appeals on July 26, 1996. Mr. Loratt stated that applicants Martinez, Sprissler, King, Bagshaw, Rasmussen, Erhardt and Hurtado were telephoned as soon as their resumes were received; that he sent out letters to the seven applicants inviting them to interview. Accompanying Employer's request is a letter dated July 10, 1996 from Susan Jeannett, an Immigration Consultant for the North County Legalization Services (AF 5). Ms. Jeanett stated that she has worked on labor certifications since 1991; that applicants Martinez, Rasmussen, Olander and Hurtado have been applying for cook positions for a year and a half and never showing up for the interviews; she stated also that Ms. King has recently started applying for these positions and not showing up for interviews.

### **Discussion**

The issue is whether Employer recruited U.S. workers in good faith and rejected them for lawful job-related reasons.

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b).

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good-faith requirement is implicit. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. § 656.1.

The record reflects that the state Employment Development Department (EDD) sent six resumes from U.S. applicants to Employer on April 20, 1995, together with a listing of their addresses and phone numbers (AF 71-72). The six applicants were Jose Hurtado, Robert Erhardt, Lawrence Sprissler, Lance Rasmussen, Daniel Bagshaw and Lindel Sue King. A second

letter from EDD dated April 25, 1995 forwarded the resumes or letters of qualifications of Berardino Martinez and Michael Ostrander to Employer (AF 39-41). Mr. Martinez's resume lists his address and telephone number (AF 35). Mr. Ostrander's address and telephone number appear on an EDD job service registration form mailed to Susan Jeannett on May 2, 1995 (AF 30-31).

On May 5, 1995, Mr. Loratt wrote to EDD stating that upon receipt of the resumes, all applicants were telephoned to see if they were still interested in the job; "[e]ach applicant indicated that they were interested. So, we mailed out interview invitations to all applicants on April 29, 1995 as evidenced by the attached letters."<sup>2</sup> (AF 25) Mr. Loratt stated that Mr. Sprissler was the only applicant who attended the interview, but that he wanted a salary of \$11.53 per hour, rather than the offered wage of \$8.00 per hour. Mr. Loratt concluded that there are no qualified or interested applicants for this position.

Mr. Lawrence Sprissler was contacted by EDD after the interview with Employer and was asked to complete a Follow-up Questionnaire, which he did on June 22, 1995 (AF 42). His version of what transpired during the interview differed from Employer's. Mr. Sprissler reported that the wages, requirements and job duties discussed during the interview were not the same as those advertised; that he was interviewed for a management position, but not offered the job and that he "was never informed one way or another concerning this position, I just assumed I wasn't hired" (AF 42).

It is well established that in order to establish good-faith recruitment, an Employer has an obligation to try alternative means of contact. *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc*). See also, *L.G. Manufacturing, Inc.*, 90-INA-586 (Feb. 5, 1992). See also, *Ceylion Shipping, Inc.*, 92-INA-322 (Aug. 30, 1993); *Roma Ornamental Iron Works, Inc.*, 92-INA-394 (Aug. 26, 1993); *Delmonico Hotel Co.*, 92-INA-324 (July 20, 1993); *Gilliar Pharmacy*, 92-INA-3 (June 30, 1993) (made only unanswered phone calls; no letters mailed); *Surrey Transportation, Inc.*, 92-INA-241 (June 2, 1993); *William Martin*, 92-INA-249 (June 2, 1993); *Allcity Auto Repairs*, 91-INA-8 (Mar. 24, 1993) (left only an unanswered message); *Warmington Homes*, 91-INA-237 (Mar. 22, 1993); *Wells Laboratories, Inc.*, 92-INA-162 (Mar. 12, 1993); *Almond Jewelers, Inc.*, 92-INA-48 (Mar. 8, 1993); *Fragale Baking Co.*, 92-INA-64, 65 (Feb. 23, 1993); *MVP Corp.*, 92-INA-58 (Feb. 1, 1993).

The employer has not established a good faith effort to recruit where it does no more than make unanswered phone calls where an applicant's address is in the record. Under these circumstances a certified letter would have been a minimally acceptable effort. In the instant case, the Employer's failure to use certified mail (with return receipt requested) to send interview letters insures that he has no proof that alternate means to contact applicants were attempted. Further, as to the two applicants whose phones were disconnected, and Employer's says no address was provided, the addresses were in fact provided by EDD. Even if they had not been provided, Employer should have contacted the referring agency to obtain an address. We

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<sup>2</sup> There are no attached letters in the file.

emphasize that the burden of proof rests with the Employer to affirmatively establish that U.S. workers were recruited.

Moreover, the Employer offered no documentation to support Mr. Loratt's contention that he made prompt contacts with the U.S. workers upon receipt of their resumes. Curiously, in rebuttal, Mr. Loratt stated that he called each applicant with the exception of Messrs. Bagshaw and Erhardt, whose phones had been disconnected. But in a previous letter to EDD, Mr. Loratt stated that he called all of the applicants upon receipt of the resumes and was told by each that they were still interested in the job.

These descriptions of applicant contacts are not consistent. Then there is the matter of Mr. Sprissler's Follow-up Questionnaire that directly contradicts Employer's version of what transpired during the job interview. This Board has held that when an employer and an applicant contradict each other and employer, who has the ultimate burden of persuasion, offers no evidence to support its position, the employer has not carried its burden of proof to substantiate its assertions and more weight is properly accorded to the applicant's statements. *See, Flamingo Electroplating, Inc.*, 90-INA-495 (Dec. 23, 1991); *Annette Glison*, 88-INA-896 (June 20, 1989). Since Employer offered no evidence to support its version of what transpired during Mr. Sprissler's interview, we credit Mr. Sprissler's statements over those of Mr. Loratt. Moreover, setting seven applicant interviews at the same date and time suggests that Employer was not seriously interviewing the applicants for the job and therefore, not recruiting in good faith.

Based on this record, we find that Employer failed to establish that it recruited U.S. workers in good faith and that it rejected U.S. workers for lawful job-related reasons. Accordingly, certification was properly denied.

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk  
Office of Administrative Law Judges*

***Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

